



Citation: *MD v Canada Employment Insurance Commission*, 2024 SST 179

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** M. D.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Daniel McRoberts

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**Decision under appeal:** General Division decision dated September 27, 2023  
(GE-23-1758)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** Teleconference

**Hearing date:** February 21, 2024

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** February 26, 2024

**File number:** AD-23-954

## Decision

[1] I am allowing M. D.'s appeal.

[2] She and the Canada Employment Insurance Commission (Commission) agree the General Division hearing was unfair to her. But they don't agree about how I should fix that error.

[3] I accept their agreement about the error. And I am sending her case back to the General Division to be reconsidered by a different member.

## Overview

[4] In this decision, I will call M. D. the Claimant because she made **a claim for EI regular benefits in 2019**. The Commission paid her benefits.

[5] Later on the Commission asked her employer for information about her earnings. The Commission decided the Claimant had under-reported her earnings.<sup>1</sup> It allocated the unreported earnings to weeks in her claim. This resulted in an overpayment. So the Commission sent her a notice of debt.

[6] The Claimant requested a reconsideration, and the Commission maintained its overpayment decision. The Claimant appealed to the Social Security Tribunal's (Tribunal) General Division. The General Division dismissed the Claimant's appeal. She appealed to the Tribunal's Appeal Division.

[7] Now the Claimant and the Commission (parties) agree the General Division made an error. They say the hearing was unfair to the Claimant. But they don't agree on how I should fix (remedy) that error.

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<sup>1</sup> See section 45 (overpayment) of the *Employment Insurance Act*, and sections 35 (earnings) and 36 (allocation of earnings) of the *Employment Insurance Regulations*.

## I accept the parties' agreement: the General Division hearing was unfair to the Claimant

[8] The Tribunal's General Division and Appeal Division have different roles. If the Claimant shows the General Division made an error, then I have the power to step in and fix the error.<sup>2</sup>

[9] The law sets out the types of errors I can consider. At the hearing, the parties agreed the General Division

- used an **unfair process** when it didn't give the Claimant an opportunity to present her evidence and arguments fully at the hearing

[10] The General Division makes an error when it uses an **unfair process**. The law calls this a failure of natural justice or a breach of the duty of procedural fairness.<sup>3</sup>

[11] The duty of procedural fairness ensures that an administrative decision-maker uses a fair and open procedure to make its decision.<sup>4</sup> This includes giving each party an opportunity to put forward their **evidence and arguments fully**. The procedure a decision-maker has to use to ensure fairness depends on the legal context and circumstances of the case.<sup>5</sup>

[12] The General Division didn't give the Claimant an opportunity to present her evidence and arguments fully.

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<sup>2</sup> I get this power from sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act). The DESD Act created the Social Security Tribunal.

<sup>3</sup> Section 58(1)(a) of the DESD Act says it's a ground of appeal (in other words, an error) where the General Division failed to observe a principle of natural justice.

<sup>4</sup> See the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

<sup>5</sup> In *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paragraphs 21 to 28, the court decided the duty of procedural fairness a decision-maker owes to a person is flexible and variable and depends on the circumstances in the case. These circumstances include: (1) nature of the decision and the process, (2) decision-making scheme the law set up, (3) impact of the decision on people affected by it, (4) a person's legitimate expectations about the procedure the decision-maker will follow, and (5) choice of procedures made by the Tribunal.

[13] I reviewed the evidence and written arguments before the General Division. And I listened to the recording of the hearing.

[14] The General Division didn't focus the hearing, and its questions, on the evidence and arguments about the issues it had to decide. For example, the hearing didn't adequately deal with the key legal and evidentiary issues under sections 35 and 36 of the *Employment Insurance Regulations*

- Was the Claimant able to show the **payroll information** the employer gave to the Commission was wrong?
- If the Claimant failed to report income, was it **earnings** under the EI Act?
- Did the Commission correctly **allocate unreported earnings** to weeks in her claim?
- If the Commission overpaid her benefits, did it correctly **calculate the overpayment**?

[15] The General Division gave very little time and attention to those issues compared to issues it had no power to decide, which it kept returning to. This frustrated the Claimant. Several times she asked the member to move on from an irrelevant issue.

[16] So I accept the parties' agreement the General Division used an unfair process.

### **The remedy: sending the case back to the General Division to reconsider**

[17] The law gives me the power to fix (remedy) the General Division's errors. In appeals like this one, I would usually fix the errors by: (1) sending the case back to the General Division to reconsider, **or** (2) making the decision the General Division should have made based on the evidence at the General Division, without considering any new evidence.

[18] The parties don't agree on how I should fix the error.

[19] The Claimant argued I should make the decision the General Division should have made. She said the appeals process is frustrating. She is drowning in documents. And her case has been going on long enough. She wanted me to bring it to an end.

[20] The Commission argued I should send the case back to the General Division to reconsider. It says the General Division didn't give the Claimant an adequate opportunity to clarify the evidence she submitted during the appeal process. So it's in the interests of natural justice to send the case back.

[21] The Tribunal's Rules say the appeal process should be as simple and quick **as fairness allows**.<sup>6</sup> This tells me I have to keep in mind the length of time an appeal is taking to get finally resolved. But the law says quickness isn't as important as giving a fair process to the parties. The Tribunal owes the parties a legal duty of procedural fairness.

[22] Because of the unfair hearing at the General Division, the Claimant wasn't able to give her evidence and arguments fully about the legal issues in her appeal. I can't consider new evidence—in other words, evidence that wasn't before the General Division.

[23] So out of fairness to the Claimant, I am sending her case back to the General Division to be reconsidered by a different member.

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<sup>6</sup> See sections 6(a) and 8(1) of the *Social Security Tribunal Rules of Procedure*.

## **Conclusion**

[24] I am granting the Claimant's appeal.

[25] I agree with the parties that the General Division hearing was unfair to the Claimant.

[26] Out of fairness to the Claimant, I am sending her case back to the General Division to be reconsidered by a different member.

Glenn Betteridge  
Member, Appeal Division